LIN SHOON JEWELLERS SDN BHD

v.

KEDAI EMAS MEE CHAN SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES (WINDING UP) NO: D5-28-335-2005]
30 NOVEMBER 2005

COMPANY LAW: *Winding up - Opposition to petition - Petition opposed by contributory - Whether contributory entitled to oppose petition - Whether contributory entitled to dispute debt - Whether disputes based on substantial grounds - Companies Act 1965, ss. 218(2)(a), 289 - Winding-Up Rules 1972, rr. 27, 28, 29*

This was a creditor's petition against the respondent company after a demand was made against the respondent under s. 218(2)(a) of the Companies Act 1965 ('the Act') for a sum of RM7,000,000. The said sum was a debt owed by the respondent to the petitioner and acknowledged by the respondent in a settlement agreement. This petition was not opposed by the respondent but by a contributory of the respondent ('opposing contributory').

Held (allowing the petition):

(1) Based on s. 289 of the Act and rr. 27, 28 and 29 of the Winding-Up Rules 1972, a contributory is entitled to appear and oppose a creditor's petition notwithstanding whether the respondent itself appears and opposes the petition. (paras 15 & 45)

(2) If the opposing contributory has fully paid up for his shares in the respondent, he must first show that the respondent is solvent and there is a likelihood that there will be a surplus of assets at the end of the process available for distribution among all the contributories. (para 45)

(3) The grounds for opposing the petition by the opposing contributory must be confined to matters that relate or affect his liabilities or rights as a contributory. For that purpose, the opposing contributory was not allowed to raise issues disputing

the debts claimed by the petitioner against the respondent. Further, the facts and circumstances clearly showed that the disputes raised were not *bona fide* and not based on substantial grounds. (para 45)

(4) The petitioner successfully established the debt in question against the respondent and that it remained unpaid. As such, the petitioner established that the respondent was unable to pay its debts. A creditor whose debt is established against a company is *prima facie* entitled to a winding-up order even though the petition is opposed by a contributory of the company. Although *via* s. 289 of the Act the court has a discretion to consider the wishes of a contributory in winding-up matters, more weight is attached to the wishes of a creditor who has proved that he is unpaid and that the debtor is unable to pay its debt. In winding-up matters, the interest of the creditor is of paramount consideration. (para 45)

[Costs to be paid by opposing contributory to petitioner.]

Case(s) referred to:

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 356 HC ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

Mascon Sdn Bhd v. Kasawa (M) Sdn Bhd [2000] 6 MLJ 843 ***(refd)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 ***(refd)***

Re Camburn Petroleum Products Ltd [1980] 1 WLR 86 ***(refd)***

Re Phoenix Oil and Transport Co Ltd [1958] Ch 565 ***(refd)***

Re Rica Gold Washing Co [1879] 11 Ch D 36 ***(refd)***

Re Rodencraft Ltd; In re WG Birch Development Ltd; In re HW Birch Ltd (Ch D) [2004] 1 WLR 1566 ***(refd)***

Taman Sungai Dua Development Sdn Bhd v. Goh Boo Kim [1997] 2 CLJ 315 CA ***(refd)***

Tractors Malaysia Bhd v. Kumpulan Pembinan Malaysia Sdn Bhd [1979] 1 MLJ 129 FC ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***

Sri Hartamas Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 16(6), 18(1)(e), 214(1), (2), 218(1)(e), (f), (2), (2)(a), 245(2)(a), 247(2), 252, 289

Companies (Winding-Up) Rules 1972, rr. 27, 28, 29, Forms 8, 9

Other source(s) referred to:
Palmer's Company Law, 23rd edn, p 1117
Chitty on Contracts, 26th edn, vol 2, pp 514 & 516

For the petitioner - HY Chong; M/s Azman Davidson & Co
For the opposing contributory - Colin Andrew Pereira; M/s Goh Wong Pereira

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali J:

[1] The petitioner filed the present petition against the respondent based on a notice dated 31 March 2005 issued under s. 218(2)(a) of the Companies Act 1965. The petition has sought to wind-up the respondent on the ground that the respondent is unable to pay its debts (under s. 18(1)(e)) and that it is just and equitable that the respondent company be wound-up (under s. 218(1)(f)). The petition is supported by another creditor, namely MBF Leasing Sdn. Bhd. based on a debt of RM334,881 owed by the respondent. The respondent does not appear to oppose the petition. The opposition to the petition comes from one Goh Koh Hwa, who is a contributory of the respondent "opposing contributory").

Undisputed Facts

[2] Prior to the presentation of the petition, the petitioner has, by notice dated 31 March 2005, made a demand against the respondent pursuant to s. 218(2)(a) of the Companies Act 1965.

[3] The demand was made for the sum of RM7,000,000, being the debt owed by the respondent to the petitioner, as acknowledged by the respondent in an agreement dated 7 September 2004 ('memorandum of agreement').

[4] The memorandum of agreement was a settlement agreement whereby the petitioner agreed to withhold legal proceedings to recover the debt if the respondent fulfilled its obligation under the memorandum of agreement. Pursuant to cl. 1(b) and cl. 4(b) of the memorandum of agreement, the debt shall become due and owing from the respondent to the petitioner; and the petitioner shall be entitled to take legal proceedings against the respondent, if any of the obligations in the memorandum of agreement were not fulfilled by the respondent.

[5] The respondent had failed to perform its obligations under the memorandum of agreement, and consequently, the debt became due and owing from the respondent to the petitioner, and the petitioner was entitled to take legal proceedings against the respondent in respect of the debt.

[6] The statutory demand was served on the respondent at its registered office on 5 April 2005.

[7] The respondent neglected to pay the sum demanded by 26 April 2005 (ie, three weeks from 5 April 2005) and, consequently, the petition to wind-up the respondent was presented on 16 May 2005.

Presumption Of Insolvency

[8] The petitioner has complied with the requirements of s. 218(2)(a) of the Companies Act 1965 and therefore the respondent is presumed to be unable to pay its debts. It is for the respondent to rebut the presumption and to prove that it is able to pay its debts. (see: *Sri Hartamas Sdn. Bhd. v. MBF Finance Bhd.* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 (SC); *Mascon Sdn. Bhd. v. Kasawa (M) Sdn. Bhd.* [2000] 6 MLJ 843 at 845H).

Is A Contributory Entitled To Oppose The Petition

[9] The present petition is a creditors winding-up petition, filed by a creditor and supported by another creditor. Both the creditors claim that the respondent owed them substantial sums of money, remained unpaid and also that the respondent is unable to pay its debts. The debt owed to the petitioner was acknowledged by the respondent in a settlement agreement (memorandum of agreement) dated 7 September 2004 duly executed by the respondent. The respondent had failed to perform its obligations under the memorandum of agreement and hence, the present petition was filed by the petitioner. The petition is not opposed by the respondent. No affidavit in opposition to the petition has been filed by the respondent and no appearance has been made by the respondent at the hearing of the petition.

[10] One interesting issue that need to be determined first is whether a contributory to the espondent is entitled to appear and to oppose the petition where the respondent itself does not appear to oppose the same.

[11] One might ask: who is a contributory? A

Section 4(1) of the Companies Act 1965 defines "contributory", in relation to a company, means a person liable to contribute to the assets of the company in the event of its being wound up, and includes the holder of fully paid shares in the company, and B prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory.

[12] Practically, in a winding-up of a company, the position of a contributory becomes important after the winding-up order has C been made and liquidators are appointed to deal with the assets and liabilities of the company. After the making of a winding-up order, the court, acting through the liquidator may either before or after it has ascertained the sufficiency of the company's assets, make calls on all or any of the contributories for the time being D settled on the list of contributories (see: s. 252 – Companies Act 1965). Calls are made upon the contributions both to enforce payment from them for their liability to the company and also to adjust their rights *inter se*. (see: s. 245(2)(a) – Companies Act 1965).

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Section 214(1) provides that on a company being wound-up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs charges and expenses of the winding-up and for the adjustment of the rights of the contributories F among themselves. In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. In the case of a company limited by guarantee, no contribution shall be required from any G member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound-up. In the case of a company limited both by shares and guarantee, every member shall be liable in addition to the amount undertaken to be contributed by him to the assets if the company, H to contribute to the extent of any sum unpaid on any shares held by him (see: s. 214(2) Company Act 1965). Contributory refers to member of a company – ie, person who agrees to become a member of a company and whose name is entered in its register of members (see: s. 16(6) – Companies Act 1965). In a company I

limited by shares, a member of that company is also known as shareholder. In a company limited by guarantee, a member is known as member.

[13] If at the end of the day, there is surplus of assets of the company, after settling all debts and liabilities as well as related costs and expenses, the court must adjust the rights of the contributories among themselves and distribute any such surplus among the persons entitled to it. (see: s. 247(2) – Companies Act 1965). In normal practice, it is for the liquidator, generally, to apply for the leave of the court to distribute assets to these persons who are found to be entitled, (see: *Re Phoenix Oil and Transport Co. Ltd.* [1958] Ch 565; [1958] 1 All ER 158).

[14] That being the case, it is clear that a contributory is an interested party in the proceedings to wind-up the company, especially when he is a shareholder of unpaid shares and when there is likelihood that there will be surplus of assets of the company at the end of the liquidation process.

[15] There is no express provisions in the Companies Act 1965 (as well as in the Companies (Winding-Up) Rules 1972) on whether a contributory is entitled to appear and to oppose a creditor's winding-up petition. In fact the act is silent about those who are entitled to appear and to oppose a petition to wind-up a company once presented.

[16] The nearest we can consider on this issue is the provisions of s. 289 of the Companies Act 1965 which *inter alia* says – the court may as to all matters relating to the winding-up of a company have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence ... . There are also provisions in the Companies (Winding-Up) Rules 1972, though not directly on the point, which may be considered in determining this issue. Rule 27 provides that every contributory or creditor of the company shall be entitled to be furnished by the petitioner or his solicitor with a copy of the petition within 48 hours after requiring the same on payment of specified fees. Rule 28 deals with notice of appearance ie, every person who intends to appear on the hearing of a petition shall serve on the petitioner or his solicitor notice of his intention. The notice may be in form 8. Form 8 does make provision for the inclusion of contributory – whereby a contributory who intends to appear on the hearing of the petition must state his name and the number and class of

shares he is holding in the company. Rule 29, deals with the list of persons intending to appear on the hearing of the petition ie, the petitioner or his solicitor shall prepare a list of the names and address of the persons who have given notice of their intention to appear in form 9 on the hearing of the petition. Form 9 also does make provision for the inclusion of contributory – whereby the same particulars (as in form 8) need to be furnished. These provisions (in the act as well as in the rules) coupled with the fact that contributory is an interested party in the outcome of a winding-up petition are not inconsistent with the appearance of a contributory on the hearing of a creditors petition, either to support or to oppose it.

[16] In *Re Camburn Petroleum Products Ltd* [1980] 1 WLR 86, Slade J found no difficulty in giving leave to a contributory to appear on a creditor's petition and be added to the list of those opposing the making of a winding-up order pursuant to the provision of the relevant statute and rules equivalent to our s. 289 of the Companies Act 1965 and rr. 27, 28, 29 and Form 8 and Form 9 of the Companies (Winding-Up) Rules 1972. The same approach was also adopted and followed by Evans-Lombe J in the case of *In re Rodencraft Ltd.; In re WG Birch Development Ltd; In re H.W. Birch Ltd*. (Ch. D) [2004] 1 WLR 1566.

[17] Based on the above considerations, the court is of the view that in winding-up proceedings against a company, be it a creditor winding-up or otherwise, a contributory is entitled to appear and oppose the petition for winding-up notwithstanding whether the respondent itself appear and oppose the petition or not. But the court must impress here that such right to appear and to oppose the petition is not without limitations. A contributory is entitled to appear and to oppose the petition so as to safeguard his interest as a contributory in the winding-up process. Whatever issue raised by a contributory in opposing the petition must relate to his interest as a contributor, not otherwise. It is to be noted that in a winding-up, the interest of the creditors is the paramount consideration. So, eventhough a contributory is allowed to appear and to oppose the petition, it must be limited to issues that touched only on his interest as a contributory. To allow a contributory, unlimited right to raise any issue in opposing the petition may be inconsistent with the basic rights given to the creditors in a winding-up proceeding.

[18] In all creditor's winding-up proceedings the petition is filed on the ground that the respondent is unable to pay its debts or in other words, the respondent is insolvent. In cases where the respondent company is insolvent, there will be no surplus of assets at the end of the liquidation process. In such a situation, if the company is limited by shares and if the contributory has fully paid for his shares in the company, then there is nothing more that he needs to contribute after winding-up order has been granted. His liability as a contributory is nil. It is not a surprise that there are very few cases where contributories have sought to appear on creditor's petition which are based on the ground that the company is insolvent ie, unable to pay its debts. They will generally have no interest to do so where they accept that their company is insolvent. His rights and interest in the winding-up process can only arise if the company is solvent and there will be surplus of assets at the end of the liquidation process which can be distributed among the contributories. That being the case, in cases where a contributory has fully paid for his shares in the company, he must first show that the company to be wound-up in a solvent company and there is a likelihood that there will be surplus of assets at the end of the liquidation process, available for distribution among all the contributories, before he can be allowed to proceed with his opposition of the petition. He must satisfy the court that he has a genuine interest in the result of the winding-up.

[19] *In re Rica Gold Washing Co*. [1879] 11 Ch. D 36 it was decided that a contributory when petitioning for a winding-up of a company must plead in his petition and prove by evidence that, if a winding-up order is made, there is a contingent surplus of assets in the winding-up which will be available for distribution to him. Subsequently, in *In re Rodencraft Ltd*, Evans-Lombe J affirmed that:

> there seems no reason why the rule in *In re Rica Gold Washing Co*. should not extend to contributors seeking to appear on creditor's petitions. His Lordship Evans-Lombe J further held that:
>
> > Thus the petitioner in either of those two classes of petition should not be put to the cost of a contested petition where the only opposition is from a contributory who cannot demonstrate that the company is solvent so that he has a genuine interest in the result.

[20] The above authorities seem to be consistent with the findings that the grounds upon which a contributory could oppose the winding-up of the company must be confined to matters which affect his interest as a contributory and not matters going to the issues of liability of the company to pay its debt. This is especially so when, as in this case, the respondent itself has not disputed the debts in this petition.

[21] In the present case, the opposing contributory has not provided any evidence in his affidavits to show that the respondent is solvent and able to pay it's debts. Therefore, applying the above principle and supported by a authorities cited above, the court is satisfied that the opposition put by the opposing contributory to the present creditor's petition must fail.

Attempt By Contributory To Dispute The Debts

[22] Even assuming that the opposing contributory is allowed to dispute the debt's owed by the respondent to the petitioner in the present petition, the court must be satisfied that the dispute raised, on the balance of probabilities is a *bona fide* dispute on substantial grounds regarding the respondent's ability to pay the debt in question. (see: *Chip Yew Brick Works Sdn. Bhd. v. Chang Hear Enterprise Sdn. Bhd.* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 and *Morgan Guaranty Trust Co. of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 95)

[23] The opposing contributory must prove, on the balance of probability that there is a *bona fid*e dispute to the sum claimed. (see: *Mascon Sdn. Bhd. v. Kasawa (M) Sdn. Bhd.* [2000] 6 MLJ 843)

This court has the power to go into the evidence before it to consider whether or not there is a *bona fide* dispute on substantial grounds. If there is no *bona fide* dispute or the grounds of dispute are flimsy or insubstantial, the court can order the winding-up of the respondent. (see: *Chip Yew Brick Works Sdn. Bhd; Morgan Guaranty Trust Co. of New York and BMC Construction Sdn. Bhd. Dataran Rentas Sdn. Bhd.* [2001] 1 MLJ 356)

No *Bona Fide* Dispute

[24] In opposing the present petition, the opposing contributory has disputed liability on the part of the respondent to pay the debts in question on the ground that the execution of the

memorandum of agreement was never authorised by the respondent since there was purportedly no directors' and member's resolution made for the purpose of executing the agreement.

[25] With this ground, the party opposing the petition should be the respondent itself, not the opposing contributory. The respondent itself was a party to the execution of the memorandum of agreement acknowledging the debts to the petitioner. The opposing contributory has stated that he is opposing the petition personally as a contributory, because a provisional liquidator has been appointed to manage the affairs of the respondent, who has unfortunately not taken any steps to resist the petition.

[26] The court finds it difficult to accept this reasoning by the opposing contributory. This is not a legitimate reason, because notwithstanding the appointment of a provisional liquidator, the directors of the respondent retain a residual power to authorise the respondent to oppose the petition. This was clearly laid down by the Court of Appeal in the case of *Taman Sungai Dua Development Sdn. Bhd. v. Goh Boo Kim* [1997] 2 CLJ 315) where it was held:

> In this case, the winding-up order had not yet been made. Authorities cited to the court showed that notwithstanding the appointment of a provisional liquidator, the directors retain the power to have the company represented in winding-up proceedings. Further, it is common ground that notwithstanding the appointment of a provisional liquidator, the board still has residuary powers, for example, it can instruct solicitors and counsel to oppose the current petition and, if a winding-up order is made, to appeal against that order.

[27] Again, in the case of *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd.* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436, the Supreme Court has also confirmed that despite the fact a liquidator has been appointed, a residual power of appeal relating to a winding-up order remains vested in the directors. This is a simple and clear principle of law which was in place for quite sometime. The opposing contributory was at all material times represented by solicitor. The opposing contributory, besides being a shareholder to the respondent, was also a director in the company. The other director was his wife, one Chong Soo Won. In fact it was the opposing contributory himself who executed the memorandum of agreement on behalf of the respondent. That

being the case, the grounds now raised to dispute the debts in question by the opposing contributory could have easily been raised by the respondent if they were genuine. "The dispute must be bona fide in both a subjective and objective sense. Thus it must be honestly believed to exist and must be based on substantial or reasonable ground": (per Jeffrey Tan J in *BMC Construction Sdn. Bhd. v. Dataran Rentas Sdn. Bhd.* [2001] 1 CLJ 356, citing *Palmer's Company Law*, 23rd edn at p. 1117). The opposing contributory has not explained why the grounds raised by him to dispute the debts in question were never raised by the respondent in the past. It is a clear indication that the opposing contributory did not honestly believe the said grounds of dispute to exist. The court is satisfied that there is no *bona fide* dispute regarding the respondent's liability to pay the debts. Failure on the part of the respondent to oppose the petition itself by disputing the debts in question, particularly the authenticity of the memorandum of agreement, clearly raised some doubt as to the genuineness of the grounds raised by the opposing contributory. As has been said by Evans-Lombe J in *In re Rodencroft Ltd.* "where the company does not appear to oppose, the court will be astute to require why that is the case". The reason given by theopposing contributory is total unacceptable. The court is more inclined to conclude that the real reason why the opposing contributory had chosed to dispute the debts in question in his capacity as a contributory, instead of as a director on behalf of the respondent, is that he knew the respondent itself could not seriously sustain its ground for disputing the debts.

No Substantial Grounds Of Dispute

[28] In order for a dispute to be accepted to defeat a petition for winding-up it must not only *bona fide* but must also be dispute on substantial grounds. The court shall now see whether the disputes raised by the opposing contributory are based on substantial grounds.

[29] The opposing contributory has raised the followings as grounds for disputing liability of the respondent to pay the debt:

(1) the memorandum of agreement was not intended to be legally binding;

(2) the respondent has performed its obligations as stipulated in the memorandum of agreement;

A (3) the petitioner is in breach of its obligations under the memorandum of agreement;

(4) there was a common mistake as to the existence of two properties in Selayang which the respondent was required to
B sell;

(5) the money owed arose from moneylending transactions and the petitioner did not have moneylending licence;

(6) the petitioner has a security in the form of debenture and
C must exercise its remedies under the debenture first.

[30] In response to allegation that the memorandum of agreement was not intended to be legally binding, the court makes the following observations:

D (a) The memorandum of agreement is beyond doubt intended to be binding. It was an agreement to record the compromise reached between the petitioner and respondent to resolve how the debt of RM7,000,000 is to be settled.

E (b) It was clearly intended to be binding as the petitioner agreed to forbear from taking legal proceedings to recover the debt, if the conditions in cl. 2 of the agreement were fulfilled by the respondent.

F (c) It is clear from the words, such as "it is hereby agreed", in the memorandum of agreement that the document is intended to be a legally binding contract. The opposing contributory is not entitled to give unambiguous words in the memorandum a different meaning. (see: *Chitty on Contracts* G (26th edn.), vol. 2 at pp. 514 & 516)

(d) It is a fallacy to suggest that the memorandum was not intended to be binding just because it would involve performance of other persons who were not parties to the
H memorandum of agreement.

(e) It should be noted that the memorandum was a settlement agreement whereby the petitioner agreed to withhold legal proceedings to recover the debt acknowledged to be owed by the respondent to the petitioner if all the conditions or events
I specified in cl. 2 were fulfilled.

(f) Where certain conditions or events in cl. 2 require the performance of other parties, the clear implication is that the respondent has to procure the performance so that these conditions or events are fulfilled, otherwise the petitioner is no longer bound to withhold taking legal proceedings to recover the debt.

[31] In response to allegation that the respondent has performed its obligation under the memorandum of agreement, the court makes the following observations:

(a) This is a bare allegation, unsupported by document, and contrary to documents shown in various affidavits of the petitioner.

(b) The fact is that none of the conditions or events specified in cl. 2 of the memorandum of agreement had been met.

(c) Thus, under cl. 1(b) of the agreement, the respondent is liable to pay the whole of the debt and the petitioner is entitled to take legal proceedings against the respondent in respect of the debt.

[32] In response to allegation that the petitioner is in breach of its obligation under the memorandum of agreement, the court makes the following observations:

(a) An examination of the terms of the memorandum of agreement would show that the only obligation the petitioner has under the memorandum of agreement is to withhold taking legal proceedings to recover the debt.

(b) It is for the respondent to ensure that the conditions or events in cl. 2 are fulfilled in order to avoid legal proceeding by the petitioner.

(c) It is therefore a red herring for the opposing contributory to accuse the petitioner of breach of the memorandum of agreement.

(d) In any event, the evidence shown in the various affidavits of the petitioner will show that the petitioner has done what was required to be done to facilitate the fulfillment of the conditions or events stated in cl. 2 of the memorandum.

[33] In response to allegation that there was a common mistake as to the existence of two properties in Selayang which the respondent was required to sell, the court makes the following observations:

(a) It should be noted that the memorandum of agreement is not an agreement to purchase the properties of the respondent. So, even if, as alleged by the opposing contributory, the respondent does not own properties in Selayang, there is no issue of common mistake.

(b) If the respondent does not own properties in Selayang, the only outcome is that condition 2(e) is not fulfilled, hence triggering cl. 1(b) and 4(b) of the memorandum of agreement.

(c) In my event, whether or not the Selayang properties exist is a matter solely within the knowledge of the respondent. If the opposing contributory now states that the respondent does not own any property in Selayang, this is clear evidence that the respondent had no real intention to fulfill its contractual obligations under the memorandum of agreement to settle the debt.

[34] In response to allegation that the money owed arose from moneylending transactions and the petitioner did not have moneylending licence, the court makes the following observations:

(a) This allegation is totally baseless and contrary to documents as shown in the petitioner's affidavit in reply of 25 August 2005.

(b) Where an agreement has been reduced to writing, the opposing contributory is not entitled to make statements in affidavits unsupported by documents to contradict the express terms of the supply and delivery agreement and the memorandum of agreement. (see: *Tractors Malaysia Bhd. v. Kumpulan Pembinan Malaysia Sdn. Bhd.* [1979] 1 MLJ 129 (FC) at 130C).

(c) This shows a desperate attempt by the opposing contributory to create a dispute by claiming that the debt was unlicensed moneylending.

[35] In response to allegation that the petitioner has a security in the form of debenture and must exercise its remedies under the debenture first, the court makes the following observations:

(a) There is no law which prohibits a creditor from exercising his statutory right to petition for a winding-up of a company until he has exercised other alternative remedy.

(b) So long a debt is owed by a company which remains unsatisfied, the creditor is entitled to petition for the company's winding-up provided the requirements of s. 218 are fulfilled.

(d) Furthermore, it is clearly provided in the debenture that the petitioner is entitled to exercise all or any other remedies available.

[36] The opposing contributory also raised the issue of a Civil Suit No: S6-22-698-2005 filed by the petitioner against him, as a guarantor, for a sum of RM3,000,000 pursuant to a guarantee agreement dated 18 May 2004 in which he guaranteed the payment of RM3,000,000 in consideration of the credit terms granted to the respondent by the petitioner.

[37] The civil suit against the guarantor consisted of the following debts owed by the respondent:

(a) to the petitioner for a sum of RM8,065,247.57 as at 27 May 2005 which is arisen from the debt acknowledged by the respondent in the memorandum of agreement, a debt which is undisputed;

(b) to the petitioner through their agent, Yong Seng Trading for a sum of RM705,433.70 as at 27 May 2005 and

(c) to the petitioner through their agent Dasing Trading for the sum of RM30,111 as at 27 May 2005.

[38] However, this winding-up petition is filed against the respondent as the borrower only for the debt acknowledged by the respondent in the memorandum of agreement.

The rights of the petitioner against the respondent company and the guarantor are not concurrent with each other. Therefore, the Petitioner is not obliged to institute a legal action against the principal borrower and the guarantor simultaneously.

[39] At the end of his submission, the counsel for the opposing contributory also raised the issue that the petitioner has not obtained any judgment for the debts in question.

[40] The court cannot accept this submission for the purpose of disputing the debts owed by the respondent to the petitioner. It has been stressed again and again in so many authorities that a judgment in respect of the debt claimed is not a pre-condition to the filing of winding-up petition against the respondent. The relevant provisions in s. 218 of the Companies Act 1965 are not worded to that affect. Section 218(1)(e) talks about "the company is unable to pay its debts". "Inability to pay debts" is defined under s. 218(2).

Para (a) of sub-s. (2) deals with a situation where the company 'is indebted in a sum exceeding RM500 then due". There is no mention about court judgment in this para (a). Only in para (b) of sub-s. (2) the words "judgment decree or order of any court" appear. In other words, in a petition where the petitioner is citing para (a) of sub-s. (2) of s. 218 as the basis for filing the petition, then there is no necessity for the petitioner to establish my existing judgment or order of the court in respect of the debt in question. If on the other hand, the petition is based on para (b) of sub-s. (2) then, there must be an existing judgment, decree or order of the court in respect of the debt in question.

[41] In the present case, the petition is filed under para (a) of sub-s. (2) of s. 218. Therefore, there is no necessity for the petitioner to establish any judgment in respect of the debt. What the petitioner has to do in such a situation is to prove to the court during the hearing of the winding-up petition (usually by way of affidavits evidence together with all the necessary supporting documents) that he is a creditor where a sum exceeding RM500 is due and owed by the respondent. The respondent itself may oppose the petition by disputing the said debt, during the hearing. There are cases where the respondent is smart enough to immediately dispute the debt upon issuance of a statutory notice under s. 218 of the Companies Act 1965 and followed by an application for injunction to restrain the petitioner from filing a winding-up petition against the respondent.

[42] At the hearing of application for injunction the petitioner, if he opposes the application may adduce evidence, usually by way of affidavits, to establish the existence of the debt in question, and of course the respondent can adduce evidence to show otherwise.

[43] The above observations clearly show that the disputes raised by the opposing contributory are not based on substantial grounds.

[44] On this issue, the court concludes that even assuming the opposing contributory is entitled to dispute the debts in question, in the present circumstances, the court finds that the disputes raised by the opposing contributory are without merit, not *bona fide* and not based on substantial grounds and therefore not sufficient to rebut the petitioner's petition for winding-up of the respondent.

Conclusion

[45] To sum up what has been adumbrated above, the court makes the following conclusions:

(a) that the opposing contributory as a contributory to the respondent is entitled to appear and oppose the creditor's petition to wind-up the respondent notwithstanding the respondent itself does not appear to oppose the petition;

(b) if the opposing contributory has fully paid up for his shares in the respondent, he must first show that the respondent is solvent and there is a likelihood that there will be surplus of assets at the end of the process available for distribution among all the contributories;

(c) that the grounds for the opposition by the opposing contributory must be confined to matters that relate or affect his liabilities or rights as a contributory to the respondent in the outcome of the winding-up process, not otherwise;

(d) for that purpose, the opposing contributory is not allowed to raise issues to the effect that he disputes the debts claimed by petitioner against the respondent. Such dispute should properly be raised by the respondent itself;

(e) even assuming the opposing contributory is allowed to dispute the debts in question, the facts and circumstances of the present case clearly show that the disputes raised are not *bona fide* disputes and not based on substantial grounds;

(f) the petitioner has successfully established the debts in question against the respondent company and that it remained unpaid. As such, the petitioner has established that the respondent was unable to pay its debts. A creditor (as the petitioner in the present case) whose debt was established is *prima facie* entitled to a winding-up order even though the petition was opposed by a contributory of the respondent. Although s. 289 of the Companies Act 1965 gives a discretion to the court to consider wishes of a contributory in all matters relating to the winding-up of a company, it would ordinarily attach little weight to such wishes in comparison with the weight it attached to the wishes of any creditor who proved both that he was unpaid and that the respondent was unable to pay its debts. It is trite principle that in a winding-up the interest of the creditor is the paramount consideration.

(g) Based on the above observations and findings, the court allows the petition, with costs to be paid by the opposing contributory to the petitioner.